(2)

No. 06-583

FILED
DEC 0 6 2006
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

United States Supreme Court

THE UNIVERSAL CHURCH,

Petitioner,

v.

ROBERT L. GELTZER
As Trustee of the Estate of Darnelle Boisrond,

Respondent.

On Petition For A Writ of Certiorari
To The United States Court of Appeals
For The Second Circuit

REPLY TO BRIEF IN OPPOSITION

Gerard A. Riso
Counsel of Record

Mark I. Chinitz
Of Counsel

STEIN RISO MANTEL, LLP
The Chrysler Building, 42nd Floor
405 Lexington Avenue
New York, New York 10174
212-599-1515

Attorneys for Petitioner

TABLE OF CONTENTS

Page

TABLE OF CONTENTS i

TABLE OF AUTHORITIES ii

REPLY ARGUMENT 2

A. The Plain Language of Section 548(a)(2)(A) Does Not Permit 2

B. Fed.R.Civ.P. 60(b) Should Be Construed Liberally To Do Substantial Justice And To Prevent Injustice 8

CONCLUSION 10

TABLE OF AUTHORITIES

FEDERAL CASES

Connecticut National Bank v. German,
503 U.S. 249, 112 S.Ct. 1146,
117 L.Ed2d 391 (1992) 4

First National Bank in St. Louis v. Missouri,
263 U.S. 640, 44 S.Ct. 213,
68 L.Ed. 486 (1924) 2, 3, 4

FEDERAL STATUTES

Bankruptcy Code § 102(7) 2, 3, 4

Bankruptcy Code § 548(a)(2) 2, 3, 4, 5, 6, 7, 8, 9

Bankruptcy Code § 707(b) 5

Dictionary Act, 1 U.S.C. § 1 2

Fed.R.Civ.P. 60(b) 8, 9

Title 11 U.S. Bankruptcy Code 3

In the Supreme Court of the United States

No. 06-583

THE UNIVERSAL CHURCH,

Petitioner,

V.

ROBERT L. GELTZER,

As Trustee of the Estate of Darnelle Boisrond

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

REPLY BRIEF OF PETITIONER

The Universal Church respectfully submits this reply brief in further support of its petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit.

REPLY ARGUMENT

A. The Plain Language of Section 548(a)(2)(A) Does Not Permit The Trustee To Aggregate The Religious Donations

The Trustee argues that the Court of Appeals "implicitly" distinguished this Court's decision in *First National Bank in St. Louis v. Missouri,* 263 U.S. 640, 657, 44 S.Ct. 213, 68 L.Ed. 486 (1924), finding it inapplicable to the construction of Section 548(a)(2)(A). Respondent's Brief, at 10. In *First National Bank, supra*, this Court held that the statutory rule of construction set forth in the Dictionary Act, 1 U.S.C. § 1, is to be applied only when necessary to carry out the evident intent of the statute. The Trustee argues that this Court's holding with respect to the Dictionary Act somehow does not apply to the nearly identical provision of Section 102(7) of the Bankruptcy Code. However, in its decision the Court of Appeals did not distinguish the rule of construction enunciated in *First National Bank*, but instead erroneously set this Court's rule of statutory construction

aside in favor of mechanically applying Section 102(7) of the Bankruptcy Code.

The Court of Appeals reasoned as follows: "It is not clear if this rule [under *First National Bank*] inhibits reliance on § 102(7), because that subsection appears within the specific title under consideration [Title 11]; its application is therefore more straightforward." App., *infra*, 8a. The Court of Appeals did not cite any support - - statutory, case law or otherwise - - to justify its departure from this Court's requirement in *First National Bank* that a statutory rule of construction requiring that the singular be read to include the plural not be applied except where necessary to carry out the evident intent of the statute. The fact that the Court of Appeals began its analysis with the words "[i]t is not clear" provides a compelling reason for this Court to clarify whether its holding in *First National Bank* also applies to Section 102(7) of the Bankruptcy Code.

The Court of Appeals also recognized that Section 548(a)(2)(A) was not ambiguous, and became ambiguous

only after applying Section 102(7): "Here, even if the text of § 548(a)(2) is not ambiguous when read alone, it is ambiguous when § 102(7) is considered." App., *infra*, 8a. Thus, only after resorting to Section 102(7) was the statute "ambiguous", leading the Court of Appeals to then erroneously resort to legislative history. This analysis contravenes *First National Bank*, which instructs courts not to mechanically apply the statutory rule of construction, and certainly not to apply it where its application creates ambiguity in an otherwise unambiguous act of Congress. This analysis also violates this Court's rule precluding resort to legislative history where the statute is not ambiguous. *Connecticut National Bank v. German*, 503 U.S. 249, 253-54, 112 S.Ct. 1146, 117 L.Ed2d 391 (1992).

The Trustee makes much of the Court of Appeals' opinion that it would be "absurd" to protect the contributions of a debtor who, on the eve of bankruptcy, theoretically could donate all of her income and assets as separate contributions, each less than 15% of her annual gross income, and thus

within the 15% safe harbor. App., *infra*, 8a-9a; Respondent's Brief, at 12 and fn. 5.

However, the absurd result envisioned by the Court of Appeals in the event a trustee was not permitted to aggregate could not, in fact, occur since other provisions of the Bankruptcy Code protect against that result. For example, the Bankruptcy Code provides for the dismissal of bad faith bankruptcy filings and the denial of a bankruptcy discharge if a debtor manipulates her finances so as to constitute "substantial abuse of the provisions of this chapter." Section 707(b) of the Bankruptcy Code; *see also* Bankruptcy Code Sections 707, 727, 1307 and 1328. Thus, in enacting the transfer-by-transfer test of Section 548(a)(2)(A), Congress no doubt relied on the existing safeguards in the Bankruptcy Code to avoid the "absurd" result envisioned by the Court of Appeals. Significantly, in this case the debtor did not engage in any of the potentially abusive conduct that the Court of Appeals sought to avoid. If she had, as noted above, she could have been denied her discharge or had her case

dismissed under the existing safeguards of the Bankruptcy Code.

Moreover, by dramatically altering the clear language of Section 548(a)(2)(A), the Court of Appeals created a more insidious potential for abusive conduct, a result that Congress had avoided by enacting the statute to unambiguously provide a transfer-by-transfer approach. The Court of Appeals recognized the absurd result that follows aggregation - - where a debtor makes contributions to more than one church or charity during a year, with each contribution less than 15 percent of the debtor's annual income but in the aggregate exceeding the 15 percent safe harbor - - by empowering a trustee "to pick and choose among charities in deciding what transfers to avoid." App., *infra*, 12a-13a. The Court of Appeals sidestepped this issue, stating "[b]ecause this problem is not implicated by the present case, we need not address it here." *Id.*, at 13a. Thus, the Court, in its own estimation, substituted one potentially absurd result for another, a view with which the Trustee agrees,

acknowledging that ""either interpretation [of Section 548(a)(2)] could lead to an absurd result." Respondent's Brief, at 12, fn. 5.

Permitting a trustee to aggregate contributions would empower a trustee to avoid contributions to a religious or charitable organization notwithstanding that the organization did not receive in excess of 15% of the debtor's gross income, effectively rendering meaningless the safe harbor provided by Section 548(a)(2)(A) and undermining Congress' will to afford such protection. A plain reading of the statute, which requires a transfer-by-transfer approach, avoids this potential abuse and absurd result.

B. Fed.R.Civ.P. 60(b) Should Be Construed Liberally To Do Substantial Justice And To Prevent Injustice

The Trustee does not view Fed.R.Civ.P. 60(b) as a means for a court to consider important issues of first impression as issues evolve in the litigation, but as a punitive barrier to prevent resolution of substantive issues on technical grounds. Respondent's Brief, at 16. As discussed in the Petition at 14-15, the issue of how to apply the 15% safe harbor under an aggregation approach was not ripe on the appeal to the district court. It was only after the district court reversed the bankruptcy court and found that Section 548(a)(2)(A) required aggregation, that this novel issue - - including whether the Trustee could recover the entire amount of the transfers or only the amount in excess of the 15% safe harbor - - crystallized, requiring a determination on the merits.

Finally, the Trustee labels the Church's "void judgment" argument under Fed.R.Civ.P. 60(b)(4), as "frivolous." Respondent's Brief, at 19. However, as the

Church demonstrates, reconsideration under Rule 60(b) is appropriate to prevent a "void" judgment, since permitting recovery of amounts protected under the safe harbor would violate Section 548(a)(2)(A) of the Bankruptcy Code. As set forth in the Petition, at 18, the Court of Appeals indirectly acknowledged that the Trustee should not be permitted to recover amounts protected by the 15% safe harbor, noting that "[t]he provisions of the bankruptcy code at issue here permit anyone to give up to 15 percent of her income to a charitable cause of her choice without avoidance of those contributions in a subsequent bankruptcy." App., *infra,* 16a. Accordingly, the Court of Appeals erred by not reversing the district court's denial of the Church's Rule 60(b) motion and remanding this issue for determination.

CONCLUSION

The petition for a writ of certiorari should be granted, and the judgment of the Court of Appeals should be vacated on the issues appealed from herein.

Respectfully submitted,

Gerard A. Riso
Counsel of Record

Mark I. Chinitz
Of Counsel

Dated: New York, New York
December 6, 2006